



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 98 OF 2018

MICHAEL RIMIRI M'INGETHA1ST APPELLANT

MAFUKO INDUSTRIES LTD2ND APPELLANT

VERSUS

ZIPPORAH MUKOMUA M'ITURI (Suing as the legal

Representative of the estate of the late JOHN

MURIUNGI ZIPORA.....RESPONDENT

(Being an appeal from the judgment and decree of the Hon. H. Ndungu CM in Meru CMCC No. 170 of 2013 made on 30/8/2018)

J U D G M E N T

1. By her plaint amended on 8/6/2016, the respondent pleaded that she was the mother of **John Muriungi Zipora (“the deceased”)** who had been involved in a fatal accident on 9/7/2012 along Chuka Road. The accident involved motor vehicle reg. no. KAH 050K driven by the 1st appellant and owned by the 2nd appellant.
2. The respondent blamed the appellants for the said accident and pleaded that as a result of the accident, the estate of the deceased had suffered loss and damage.
3. In their defence, the appellants denied the respondent’s claim and put her to strict proof of every allegation in her statement of claim. After trial, the trial Court held the appellants liable for the accident and awarded the respondent damages of Kshs.2,383,200/- after deducting 20% contribution.
4. Aggrieved by that decision, the appellants have appealed to this Court raising 8 grounds that can be summarized, thus; ***that the trial Court erred; in apportioning 80% liability to the appellants, in failing to consider the submissions of the appellants, in failing to take account the award under the Law Reform Act when awarding damages under the Fatal Accidents Act, in awarding special damages of Kshs.49,000/- that was not proved and, in awarding damages that were excessive in the circumstances.***
5. As the first appellate Court, this Court is enjoined to re-appraise the evidence afresh and come to its own independent findings and conclusions. In doing so, it must have in mind that the trial Court had the advantage of seeing the witnesses testify. **See *Selle & Another v. Associated Motor Boat Co. Ltd* [1968] EA 123.**
6. I have carefully considered and re-evaluated the evidence and the submissions of both the appellants and the respondent.
7. The first ground was that the trial Court erred in apportioning 80% liability upon the appellants. They submitted that the deceased jumped into a moving vehicle and failed to heed the warning of the driver of the subject vehicle. They pressed for 50% contribution. On her part, the respondent submitted that there was no reason to interfere with the trial Court’s findings on both liability and quantum.
8. **Julius Mwenda (PW3)** was an independent eye witness. He told the Court that he was at the material time buying some credit within Kware market when the subject vehicle came and stopped at some shops. He saw the deceased remove crates of bread to and from the shop. In the process, the subject vehicle reversed and crushed the deceased. The driver of the vehicle did not hoot or give any warning that he intended to reverse. That evidence remained unchallenged as the appellants absented themselves from the hearing.
9. On the other hand, the 1st appellant who was the driver of the subject vehicle gave contradictory evidence. In his written statement which was adopted as part of his evidence in chief, he stated that while at Kware Market, the deceased jumped on the left side door of the vehicle

and tried to hang like a tout. At the trial, he stated that he reversed to deliver bread to the verandah and the owner of the bread was hit and later died while undergoing treatment. He was not seeing the victim until people screamed.

10. From the two versions, it is quite clear that the deceased never contributed to the accident. He was innocently ferrying crates of bread from the subject vehicle to his Kiosk when the 1st appellant negligently run over him. The 1st appellant himself was categorical that he did not see the deceased until he heard people scream that he had run over him.

11. To my mind, the trial Court erred in apportioning 20% contribution to the deceased without any basis at all. The appellant's were 100% to blame. The driver failed to satisfy himself that it was safe for him to reverse the vehicle at the time. He also failed to give any warning whatsoever thereby causing the accident. He knew the deceased was ferrying crates of bread at the rear of the vehicle, yet he decided to reverse the vehicle. Since there was no cross-appeal, I will not disturb the finding of 80% liability against the appellants.

12. The second ground was that the trial Court erred in failing to consider the submissions of the appellants. This was not a serious ground. The trial Court was clear in its judgment that by the time of writing the judgment, the appellants had not filed their submissions.

13. I have carefully perused the record. On 28/6/2018, the trial Court gave the parties 14 days each beginning with the respondent to file and serve their respective submissions. The matter came up for mention on 1/8/2018 to confirm compliance and the Court fixed the judgment date as 30/8/18.

14. The appellant filed their submissions on 20/8/2018 way after their 14 days had expired and probably when the judgment must have been written, as the trial Court indicated in its judgment or, when the file was with the Court and the same did not find its way to the Court file. In this regard, the trial Court cannot be blamed for failure to consider the submissions that had not been brought to its attention. The appellants have themselves to blame. Their failure to comply with the order of the Court made on 28/6/2018 was in breach of **section 1A (3) of the Civil Procedure Act** which enjoins every party and advocate to assist the Court to further the overriding objective of the **Act**. That ground fails.

15. The third ground was that the trial Court erred in failing to take account the award under the **Law Reform Act** when awarding damages under **Fatal Accidents Act**. Nothing could be further from the truth. It is clear from the judgment that after making an award of Kshs.3,000,000/- under the **Fatal Accidents Act**, the Court deducted a sum of Kshs.70,000/- therefrom, being the award it had made under the **Law Reform Act**. That ground also fails.

16. The next ground is that the trial Court erred in awarding special damages of Kshs.49,000/- which had not been proved. The respondent produced receipts from Saints Funeral Services for Kshs.20,000/, Menya Holdings Sacco Ltd for Kshs.24,000/- for transporting mourners and a receipt for Kshs.5,000/- from the Chuka District Hospital for embalment.

17. The said receipts were neither objected to nor challenged at the trial. The expenses for which they were alleged to have been incurred are not only expected expenses but also reasonable in the circumstances. I see no reason for the complaint. The trial Court properly allowed the said specials as having been proved. I reject that ground.

18. The final ground was that the trial Court erred in awarding general damages that were excessive in the circumstances. It was submitted that the trial Court failed to consider the disparities in the testimonies of **PW1 and PW2** as to the deceased's income. That it also failed to consider the investigation report of Blight Loss Assessors (K) and the letter from the 2nd appellant. In their estimation, the award should have been Kshs.381,240/- on the basis of a ratio of 1/3, multiplicand of Kshs.4,854/- and a multiplier of 15 years.

19. The appellants relied on the cases of **Kenya Power & Lighting v. Mathew Kabage Wanyiri [2016] eKLR**, **Jamal Aleem v. Bernard Rutto [2018] eKLR** and **Nickson Muthoka Mutavi v. Kenya Agricultural Research Institute [2016] Eklr** in support of those submissions.

20. On the other hand, it was submitted for the respondent that the principle of lump sum was properly applied. That the Court should enhance the award to Kshs. 10,000,000/-. The cases of **MNM & Another v. Solomon Karanja Githinji [2015] eKLR** and **Benedeta Wanjiku Kimani v. Changwon Cheboi & Another [2013] eKLR**, were relied on for those submissions.

21. The appellants' contention was that the deceased was not married and did not have children. That was the evidence of the investigator who testified as **DW2**. On the other hand, there was the evidence of **PW1 and PW2** that the deceased had children. Birth Certificates for the said children were produced and not challenged. Birth Certificates are but prima facie evidence of parentage of someone. These having not been impeached, I am satisfied that the trial Court was entitled to believe the evidence of **PW1 and PW2** to that of **DW2**.

22. The evidence before the trial Court was that the deceased was 32 years. The claim that he was working for the 2nd appellant was not proved. However, it was clear from the testimonies of **PW1, PW2, PW3 and DW1** that he had a business of a Kiosk in Kware market at Kanwa in Chuka. It was **DW1's** evidence that the deceased would take 5 to 10 crates of bread each time he made delivery to him. He however, did not tell the Court at what intervals he made the deliveries.

23. It was also stated in evidence that the deceased used to farm miraa, maize and beans. Of course maize and beans would be used for consumption by the family while the miraa would be for income. It was estimated to be two sessions a month at Kshs.20,000/- a session.

24. There was no documentary evidence that was produced to prove the income. While documentary evidence would be the best evidence, it cannot however be said that in its absence the deceased was not having any income. It will be fool hardy to expect and insist that a Kenyan in the rural set up should keep documents as proof of his income, yet he eats, clothes himself and family, and takes his/own children to school. I will reject any notion that such a Kenyan has no income and that in the event of his demise by whatever means, his estate suffers no loss.

25. All that documentary evidence does is to give the Court an estimation of the actual income a person derives from his economic activities. Where there is no such documentary evidence, the Court should then resort to the principle of lump sum.

26. In **Albert Odawa v. Gichimu Githenji [2007] eKLR**, Koome J (as she then was) quoted Ringera J in **Mwanzia v. Ngalali Mutua v Kenya Bus Services (Msa) Ltd & Another** wherein he stated:-

‘The multiplier approach is just a method of assessing damages. It is not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do’.

27. Because of the inexactitude in ascertaining the income of the deceased, the trial Court was right in resorting to the lump sum principle.

28. However, in resorting to the lump sum principle, a trial Court should be guided by the age of a deceased, the expected length of dependency and the estimated income. The award should not be so inordinately high or low as to be a wrong estimate of damages.

29. On matters quantum, the jurisdiction of this Court is well settled. In **Bhutt v. Khan [1982 -1988] KLR 1**, it was held that an appellate Court is not to interfere with the award of quantum unless it is shown that the trial Court proceeded on wrong principles or that it misapprehended the evidence in some material particular so as to arrive at a wrong figure of damages or that the damages awarded are too high or too low as to represent an entirely erroneous estimate.

30. In the present case, the trial Court awarded damages of Kshs.3,000,000/- under the **Fatal Accidents Act**. It deducted therefrom Kshs.70,000/- it had awarded under the **Law Reform Act**. The trial Court relied on the case of **Oyugi Judith & Another v. Fredrick Odhiambo & 3 Others [2014] eKLR**.

31. I have considered the decision in **Oyugi Judith & Another v. Fredrick Odhiambo & 3 Others (supra)**, which the court relied on. It is not correct as stated by the trial Court that the Court gave a lump sum of Kshs.3,000,000/- in that case. In that case, Majanja J applied the lump sum principle and awarded Kshs.700,000/- to a 30 year old boda boda operator. He awarded a similar amount to an unemployed 28 year old. The Court gave 3 awards for 3 different appellants. In relying on that decision that it awarded kshs.3,000,000/-was a misdirection.

32. In **MNM & Another v. Solomon Karanja Githinji [2015] eKLR**, the Court gave a global figure of Kshs.3,000,000/- where the deceased was 46 years old running a butchery in Nairobi.

33. In the present case, considering the age of the deceased, he was 32 years with two children and a mother dependent on him. He had a business at Kanwa and was farming at Maua, I will reduce the award from Kshs.3,000,000/- to Kshs. 2,000,000/-.

34. Accordingly, the appeal is partially successful. I allow the appeal and set aside the judgment on quantum and award damages as follows:-

a) Loss of dependency - Kshs.2,000,000/-

b) Less damages under

Law Reform Act - Kshs. 70,000/-

c) Special damages - Kshs. 49,000/-

Sub-total - Kshs.1,979,000/-

Less 20% contribution - Kshs. 395,800/-

Total - **Kshs.1,583,200/-**

35. The special damages will attract interest at court rate from the date of filing suit while the general damages will attract interest at court rate from the date of judgment in the lower court until payment in full.

36. The respondent will have the costs in the lower Court while the parties will bear own costs of the appeal.

It is so decreed.

DATED and **DELIVERED** at Meru this 30th day of January, 2020.

A. MABEYA

JUDGE